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No. 87-1599

In the Supreme Court of the United States

OCTOBER TERM, 1987

RONALD CECIL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in limiting petitioners' cross-examination of a government witness.

2. Whether the jury selection procedures used in the District of Maryland deprived petitioners of a petit jury drawn from a fair cross-section of the community.

3. Whether the court of appeals had the authority to hear this case en banc without a request by one of the parties.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A87) is reported at 836 F.2d 1431.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1988. A petition for rehearing was denied on February 5, 1988. The petition for a writ of certiorari was filed on March 26, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioners Haddix and Hayes were convicted on one count of conspiracy to import and to possess with intent to distribute more than 1000 pounds of hashish, in violation of 21 U.S.C. 952(a) and 841(a)(1)

(Count 1); three counts of importation of hashish, in violation of 21 U.S.C. 952(a) (Counts 2, 3, and 4); and one count of possession of hashish with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 5). Petitioner Cecil was convicted on Count 5 and acquitted on Counts 1 through 4. Petitioner Haddix was sentenced to a total of eight years' imprisonment and a five-year special parole term. He was also fined a total of $60,000. Petitioner Hayes was sentenced to a total of two years' imprisonment and a two-year special parole term. Petitioner Cecil was sentenced to 42 months' imprisonment and a 42-month special parole term. He was also fined $10,000. The court of appeals affirmed (Pet. App. A1-A87).

1. The evidence at trial, which is not disputed, is summarized in the opinion of the court of appeals (Pet. App. A5-A7). It showed that petitioners were among 22 persons who in 1980 and 1981 conspired to import 36,000 pounds of hashish into the United States. The conspirators took possession of the hashish off the coast of Lebanon, loaded it onto a vessel in the Mediterranean Sea, and placed it onto an ocean-going ship for delivery to Maryland. When the ship reached the Maryland shore, the hashish was unloaded and stored for future distribution. One of petitioners' confederates, Richard Creswell, who later became a government witness at trial, was responsible for leasing the house in Maryland where the hashish was stored. He also leased a nearby apartment that served as the confederates' headquarters. *Id.* at A5-A6.

2. Prior to trial, petitioner Cecil moved for production of the records of the jury clerk for the District of Maryland, contending that the plan for jury selection in that district violated the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.*, and the Sixth Amendment. He asserted that the voter registration list, from which juries were selected, did not reflect a fair cross-section of the com-

munity, in that it underrepresented blacks and persons between the ages of 18 and 34. Relying on *Duren* v. *Missouri*, 439 U.S. 357 (1979), the district court found (Pet. App. C7) that petitioner had failed "to establish a *prima facie* case of a violation of the fair cross-section requirement" and it therefore denied the motion for production of records. The court explained (*id.* at C10-C11) that "the statistics upon which [petitioner] rel[ied] in support of [his] claims of underrepresentation, even if true, are insufficient to establish the type of systematic exclusion required by *Duren* in order to prove a violation of the fair cross-section-of-the-source requirements of the Act and the Constitution."

3. Toward the close of the government's case and immediately before Creswell was to testify, counsel for petitioner Cecil advised the prosecutor that during his cross-examination of Creswell he planned to use the record of a notice of intention to present a defense of insanity and diminished capacity that Creswell's attorney had filed in connection with a 1981 prosecution of Creswell in the Eastern District of New York. The prosecutor asked the trial court to hold a hearing in limine on the admissibility of that evidence. Defense counsel did not have the pertinent records available at that time, but he represented that they would show that after Creswell was indicted for jumping bond, he filed a "Rule 12.2 Notice" (see Fed. R. Crim. P. 12.2), in which he stated his intention to assert a defense of diminished capacity and insanity. Counsel also proposed to offer a "tentative" statement of Dr. Seymour Kuvin, a psychiatrist who had examined Creswell in early June 1981. In the statement, according to counsel, Dr. Kuvin reported that while he could not "present any finite psychiatric opinions without a psychiatric examination of Mr. Creswell, from the information supplied, it is highly probable that Mr. Creswell exhibited a pathological personality disorder in his most unusual attachment to his mother." Counsel

advised the court that he proposed to devote "two minutes or less" to that line of cross-examination. Pet. App. A9-A10,

The district court held that the proffered evidence was inadmissible (Pet. App. B1-B4). The court explained (*id.* at B2) that Creswell's mental state in 1977—when he was alleged to have jumped bond because of "his reaction * * * to his mother's death and the breaking of the strong mother-son ties"—was "utterly and completely extraneous to the present case." The court distinguished a prior Fourth Circuit case, noting that in the present case "we are not talking about a state of mind which existed * * * during the time when the witness is said to have obtained the information about which he is testifying" (*ibid.*). The court also found that the proposed cross-examination had "miminal probative value in light of the manifest and manifold other attacks on this witness available to defense counsel" (*id.* at B3). The court invited counsel to renew his offer if additional relevant evidence became available (*id.* at B4).

Counsel requested a rehearing on the issue the next day. At that time, he produced the actual Rule 12.2 Notice, a diagnosis of Creswell by Dr. Kuvin based on interviews conducted in May or June 1981 (Pet. App. F4-F9), and a document styled a "Certification" (*id.* at F1-F3), which consisted of an unsworn statement by Dr. Kuvin in March 1983. In his 1981 diagnosis, Dr. Kuvin stated that he found Creswell "cooperative and candid throughout the entire examination," that Creswell was "oriented as to time, place and person," and that he did "not appear to have any gross memory deficits" (*id.* at F4, F7). Dr. Kuvin nevertheless found Creswell to have "spotty memory losses" and he stated that Creswell had "endowed himself with unlimited powers" (*id.* at F7, F9). Dr. Kuvin explained (*id.* at F9) that Creswell had jumped bond because of his "pathological attachement [*sic*] to his mother and his need to protect her in any eventuality." He also stated that, in his opinion, Creswell's

actions were the "product of his mental illness and precluded him from conforming his conduct to the requirements of the law" (*ibid.*).

In the 1983 "Certification" (Pet. App. F1-F3), Dr. Kuvin reported that he had examined Creswell in May and June 1981. Dr. Kuvin stated that, in his opinion, his 1981 diagnosis of Creswell was an accurate account of Creswell's emotional condition from 1977, the date of the bond jumping, through June 1981, the date of Dr. Kuvin's report (*id.* at F1-F2). Dr. Kuvin also stated his "further opinion that the facts and conclusions set forth [in his diagnosis] would exist today assuming the absence of any psychiatric therapy and/or counseling by Mr. Cresswell [*sic*] from the date of my examination" (*id.* at F2). Dr. Kuvin reported that he had reviewed the plea agreement signed by Creswell and stated that in his opinion "[t]here are sufficient inducements and opportunities offered in that agreement to provide stimulus to Mr. Cresswell [*sic*] so that in the face of this personality disorder, there is little likelihood of his testimonial capacity being credible" (*id.* at F3).

The district court held that the Rule 12.2 Notice, the 1981 diagnosis, and the Certification were inadmissible. The court explained that the notice had never ripened into an actual insanity plea and that the balance of the material consisted of unsworn statements on which Dr. Kuvin was not subject to cross-examination. Pet. App. A17.

4. After first hearing petitioners' appeals before a panel, the court of appeals convened en banc and affirmed the convictions by a divided vote (Pet. App. A1-A87). The court first upheld (*id.* at A7-A33) the trial court's order refusing to permit Cecil's counsel to use the Rule 12.2 Notice and the Certification in cross-examining Creswell. It noted (Pet. App. A19) that the material was of "doubtful admissibility" under Rule 12.2(e), since "the notice itself was dismissed by the court as untimely and Creswell abandoned any

attempt to proffer such a plea."[1] In any event, the court held (Pet. App. A20), "it is plain that the district judge was correct in finding that this evidence was irrelevant to the issues in the 1983 prosecution, and, if admitted, would have introduced an extraneous matter that would have required a great waste of judicial time." The court explained that even if Creswell's decision to jump bond in 1977 was prompted by his intense attachment to his mother, that factor was not shown to bear on his credibility in 1983 when Creswell testified at trial (*ibid.*). Moreover, the court stated, to permit the proposed line of cross-examination would have "inject[ed] into this case practically a trial of Creswell's defense to the bail jumping charge" (*id.* at A21). The court also found that the Certification was inadmissible because defense counsel had not made Dr. Kuvin available for cross-examination (*id.* at A22) and because the Certification strayed beyond the appropriate province of expert testimony (*id.* at A25-A28). Finally, the court noted that defense counsel had been able to offer other evidence attacking Creswell's credibility, including his previous use of aliases, his involvement in drug smuggling, his procuring of driver's licenses under false pretenses, and his frequent personal use of narcotics (*id.* at A29-A30).

The court of appeals next rejected (Pet. App. A33-A57) petitioners' challenge to the jury selection procedure. It noted that the use of voter registration lists as the source for a jury wheel "has been expressly sanctioned by Congress" (*id.* at A33) and has been uniformly approved by the courts of appeals (*id.* at A40-A41). The court explained

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[1] The court recognized that subsection (e) of Rule 12.2 did not become effective until shortly after Creswell's 1983 trial, but it explained that "the Report of the Rules Committee and the Recommendations of the Judicial Conference were well known before March, 1983" (Pet. App. A20).

that the use of voter registration lists "will not be invalidated because a group chooses not to avail itself of the right to register without any discrimination of any kind" (*id.* at A41). The court also observed (*id.* at A43 (footnote omitted)) that the Maryland jury selection plan had been "approved in the manner required by the statute by the chief judge and the other district judges of Maryland and by the Judicial Council of this Circuit, 28 U.S.C. § 1863(a); and that plan recites affirmatively the combined judgment of both the district court and of this court that 'voter registration lists represent a fair cross-section of the community in the District of Maryland.' " Finally, the court stated (*id.* at A49) that "[e]ven were it to be considered that a substantial underrepresentation of a cognizable group on the voter registration lists because of the failure of members of such group to register may be a ground for requiring supplementation of such list * * * the [petitioners] have not made a proper showing of such underrepresentation to support a showing of that character." The court found petitioners' allegations regarding the underrepresentation of blacks on the voter registration lists in Maryland to be "conclusory" (*id.* at A50) and their data to be out of date (*id.* at A52). The most recent census figures, the court noted, showed that blacks were not significantly underrepresented among registered voters in the District of Maryland (*id.* at A52-A54).[2]

Judge Phillips, joined by two other judges, concurred in part and dissented in part (Pet. App. A60-A87). He agreed that the admissibility of "mental impairment evidence" is "committed in the first instance to the discretion of the trial judge" (*id.* at A60-A61) and that trial courts have "great latitude for excluding this type of evidence" (*id.* at A61).

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[2] The court of appeals also held that there was sufficient evidence to convict petitioner Hayes of conspiracy to possess hashish with intent to distribute it (Pet. App. A57-A59). The petition does not present that issue.

In his view, however, "under the special circumstances of this case" (*ibid.*), the district court abused its discretion in denying defense counsel an opportunity to use the Rule 12.2 Notice and the Certification. Judge Phillips stated that evidence bearing on Creswell's credibility was "absolutely critical" to the defense and that the evidence in question bore "directly and heavily" on that issue (Pet. App. A62). Judge Phillips also disagreed (*id.* at A69-A87) with the court's rejection of petitioner's challenge to the use of voter registration lists for jury selection. He explained (*id.* at A73-A80) that the substantial underrepresentation of a distinctive group from a petit jury venire violates the Jury Selection and Service Act of 1968 even without intentional discrimination in either the voter registration or jury selection processes. And while he agreed that the court had relied on "the most appropriate available data concerning voter registration figures," that the data were "accurate," and that there "quite probably" was no substantial underrepresentation of any cognizable group (*id.* at A81), Judge Phillips concluded (*id.* at A80-A87) that there was not a sufficient factual record to resolve that question. He therefore would have remanded the case to the district court for further proceedings with respect to the fair-cross-section challenge.

ARGUMENT

1. Petitioners first contend (Pet. 7-14) that the trial court erred in disallowing the use of the Rule 12.2 Notice and the Certification of Dr. Kuvin during the cross-examination of Creswell. As petitioners acknowledge (Pet. 7, 9), however, the scope of cross-examination at trial is committed to the discretion of the trial court and will not be reversed unless that discretion is abused. See *Delaware* v. *Van Arsdale*, 475 U.S. 673, 679 (1986); *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974); *Alford* v. *United States*, 282 U.S. 687, 694 (1931).

Pursuant to Fed. R. Evid. 403, the trial court, affirmed by the court of appeals (Pet. App. A20-A21), held that the Rule 12.2 Notice related to conduct that was remote in time and that the evidence was therefore "utterly and completely extraneous to the present case" (Pet. App. B2). Moreover, as the court of appeals suggested (*id.* at A22), the Certification of Dr. Kuvin was hearsay and therefore inadmissible for that reason alone. In any event, as the court of appeals noted (*id.* at A29-A30), defense counsel had been able to marshal substantial evidence, apart from the excluded evidence, with which to cross-examine Creswell—including his use of aliases, his involvement in drug smuggling, and his frequent personal use of narcotics. Under those circumstances, the trial court's decision to exclude the Notice and Certification under Rule 403 was not an abuse of discretion. See *United States* v. *Jamil*, 707 F.2d 638, 642 (2d Cir. 1983); *United States* v. *Diecidue*, 603 F.2d 535, 551 (5th Cir. 1979), cert. denied, 445 U.S. 946 (1980); *United States* v. *Leonard*, 524 F.2d 1076, 1092 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976).

2. Petitioners next contend (Pet. 15-22) that the trial court erred in denying their request to inspect the jury-selection records and in rejecting their challenge to the use of voter registration lists to select the petit jury venires in the District of Maryland. As we acknowledged in the court below, petitioners were entitled to inspect the jury-selection documents under this Court's decision in *Test* v. *United States*, 420 U.S. 28 (1975). The district court's failure to provide those materials to petitioners was harmless, however, because it is clear that the use of voter registration lists as a source for the petit jury venires in the District of Maryland could not successfully be challenged. Because the claim for which petitioners sought the jury-selection records was clearly without merit, the denial of access to the records did not prejudice them.

We do not dispute petitioners' contention that substantial underrepresentation of distinctive groups on voter registration lists, even in the absence of intentional discrimination, may produce a jury venire that is inconsistent with the dictates of the Sixth Amendment and the Jury Selection and Service Act, 28 U.S.C. 1861 *et seq.* Every court of appeals that has addressed the issue, however, has held that the use of voter registration lists as the source for jury venires does not violate either the Jury Selection and Service Act or the Sixth Amendment. See, *e.g.*, *United States* v. *Afflerbach*, 754 F.2d 866, 869-670 (10th Cir.), cert. denied, 472 U.S. 1029 (1985); *United States* v. *Pepe*, 747 F.2d 632, 648-649 (11th Cir. 1984); *United States* v. *Hafen*, 726 F.2d 21, 22-24 (1st Cir.), cert. denied, 466 U.S. 962 (1984); *United States* v. *Hawkins*, 661 F.2d 436, 442 (5th Cir. Unit B 1981), cert. denied, 456 U.S. 991 (1982); *United States* v. *Warinner*, 607 F.2d 210, 214 (8th Cir. 1979), cert. denied, 445 U.S. 927 (1980); *United States* v. *Brady*, 579 F.2d 1121, 1134 (9th Cir. 1978), cert. denied, 439 U.S. 1074 (1979). No court of appeals has found the underrepresentation of any group on voter registration lists to be substantial enough to result in a statutory or constitutional violation, or to require the supplementation of the voter registration lists with names drawn from other sources.

Moreover, as the court of appeals explained (Pet. App. A52-A54), and as petitioners do not dispute, the most recent available census data in Maryland disclose no significant disparity between the percentages of blacks and whites who register to vote: approximately 67.5% of all whites of voting age were registered to vote, as compared to 61.4% of all blacks. Those figures reflect a much smaller disparity in the relative representation of blacks and whites on voter registration lists than in many cases in which the use of voter registration lists has been upheld against a Sixth Amendment or statutory challenge. See, *e.g.*, *United States* v.

Pepe, supra; *United States* v. *Tuttle*, 729 F.2d 1325 (11th Cir. 1984); *United States* v. *Butler*, 611 F.2d 1066, 1070 (5th Cir.), cert. denied, 449 U.S. 830 (1980); *United States* v. *Maskeny*, 609 F.2d 183, 190 (5th Cir.), cert. denied, 447 U.S. 921 (1980); see generally *Swain* v. *Alabama*, 380 U.S. 202, 208-209 (1965).[3]

Finally, petitioners' challenge to the use of voter registration lists as the source for selecting juries in Maryland comes on the heels of a comprehensive ruling upholding precisely the same system as satisfying both the Jury Selection and Service Act and the Sixth Amendment. See *United States* v. *Blair*, 493 F. Supp. 398, 407 (D. Md. 1980), aff'd, 665 F.2d 500 (4th Cir. 1981). The court of appeals relied in part on the *Blair* case in upholding the Maryland jury selection system, and petitioners have not suggested how they could have succeeded in their challenge to that system where the defendants in the *Blair* case failed. Thus, regardless of the denial of access to the jury selection records that petitioners requested, it is clear that petitioners could not prevail on the merits of their claim. For that reason, the court of appeals' rejection of that claim warrants no further review.

3. As their last point (Pet. 23-29), petitioners invite this Court to decide the question whether the court of appeals, in the absence of a specifically promulgated local rule, had the authority to hear this case en banc without a request to do so from one of the parties. Petitioners acknowledge (Pet. 24-25), as they must, that the courts of appeals have the power to initiate en banc hearings sua sponte. See

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[3] Petitioners' assertion that persons between the ages of 18 and 34 are likewise underrepresented is immaterial, since "young persons" are not a " 'distinctive' group in the community" within the meaning of *Duren* v. *Missouri*, 439 U.S. 357, 364 (1979). See *Barber* v. *Ponte*, 772 F.2d 982, 1000 (1st Cir. 1985) (en banc), cert. denied, 475 U.S. 1050 (1986).

Western Pacific R.R. Corp. v. *Western Pacific R.R.*, 345 U.S. 247 (1953). Rule 35(a) (Fed. R. App. P.) states that an appeal may be heard by a court of appeals en banc whenever "[a] majority of the circuit judges who are in regular active service" order that an en banc court be convened. And as the advisory committee notes make clear, the rule "does not affect the power of a court of appeals to initiate in banc hearings *sua sponte*."[4]

Petitioners suggest, however, that Rule 35 should be read to contain an implicit limitation, nowhere stated in the text, requiring that courts of appeals promulgate a local rule before they may convene an en banc court sua sponte. There is no warrant for reading any such limitation into the text. Cf. *Huddleston* v. *United States*, No. 87-6 (May 2, 1988), slip op. 6-7; *Bourjaily* v. *United States*, No. 85-6725 (June 23, 1987), slip op. 6. The statutory authority for Rule 35 is found in 28 U.S.C. 46(c). Interpreting that provision in the *Western Pacific* case, this Court explained (345 U.S. at 259) that Section 46(c) permits "the court itself" to decide the manner in which the en banc power shall be exercised and that "the power may be called into play by any proce-

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[4] Petitioners rely on the advisory committee notes to support the proposition that the Rules of Appellate Procedure "do not provide for the initiation of *en banc* hearing *sua sponte*" (Pet. 9). But in so doing, they misquote the Committee's notes. In petitioners' version (*id.* at 25 n.9 (emphasis added)), the notes are quoted as stating that Rule 35 "does not *effect* the power of a court of appeals to initiate *en banc* hearings *sua sponte*." In the actual text, however, the notes use the word "affect," not "effect." The difference in meaning is significant. Rule 35 was designed to formalize a litigant's right to request en banc rehearing, a right that this Court in *Western Pacific* endorsed as a matter of sound practice but held not to be a matter of statutory right. See 345 U.S. at 261-262. The advisory committee made clear that Rule 35, while affording litigants the power to request en banc rehearing, did not "affect" the traditional discretion of the courts of appeals to convene en banc courts sua sponte.

dure convenient to the court" (*id.* at 259 n.19). The Court emphasized, in particular, that a court of appeals need not assemble in order to convene an en banc proceeding but might use instead a "more informal procedure," including, for example, an order issued by the Chief Judge (*ibid.*).

Petitioners also complain (Pet. 27-29) that the decision to proceed en banc in this case violated "the spirit of *en banc* review," because under Rule 35(a)(2) review by an en banc court must be reserved for questions "of exceptional importance." We do not understand petitioners to contend, however, that the questions they raised on appeal, and now present to this Court, were unworthy of en banc consideration. Under Supreme Court Rule 17, the writ of certiorari is likewise restricted to "special and important" questions, and petitioners repeatedly insist that the questions presented in their petition meet that standard (see Pet. 14, 16, 17, 22). The court of appeals apparently agreed since it regarded the implications of petitioners' challenge to the jury selection procedure in this case as posing a "disturbing, almost devastating, effect * * * on the orderly and efficient conduct of criminal trials" (Pet. App. A55).[5]

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[5] Petitioners suggest (Pet. 25-26) that Judge Friendly, in *United States* v. *New York, N. H. & H. R.R.*, 276 F.2d 525, 553 n.1 (2d Cir.) (opinion on application for hearing in banc), cert. denied, 362 U.S. 961 (1960), "expressed strong doubts as to whether the Circuit had" the power to proceed en banc, sua sponte, without a local rule so providing. In fact, in the cited passage Judge Friendly was voicing a very different concern: he was expressing his doubt whether, in the absence of a request by a party, an en banc proceeding may be ordered "at the request of a judge not participating in the decision" (276 F.2d at 553 n.1). And while Chief Judge Lay, in *United States* v. *Samuels*, 808 F.2d 1298, 1299 (8th Cir. 1987), "question[ed] the propriety" of a sua sponte decision to proceed en banc, no other judge on the court of appeals joined him in the expression of that view.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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JUNE 1988

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